IN THE MATTER OF LICENSE NO. 312287
MERCHANT MARINER'S DOCUMENT NO. Z-301476
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Robert L. White

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1603

Robert L. White

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 12 October 1965, an Examiner of the United States Coast Guard at Port Arthur, Texas suspended Appellant's seaman's document for three months, upon findings him guilty of misconduct. The specifications found proved allege that while serving as chief mate on board the United States USNS MISSION SAN RAFAEL under authority of the document and license above described.

(1) On or about 28 or 29 April 1964, at Beaumont, Texas, wrongfully caused Grade "B" cargo to be transferred into a cofferdam, "thereby altering the character of the cofferdam as defined in Title 46 CFR 30.10-13;"

(2) On or about 28 April 1964 and 3 July 1965, "while said vessel was at Sea," wrongfully caused alterations to the cargo piping system in violation of 46 CFR 30.01-10;

(3) On or about 28 and 29 April 1964, at Beaumont, Texas, wrongfully caused cargo to be transferred over the deck through an open ended hose into an open hatch, in violation of 46 CFR 35.35-20(d);

(4) On or about 28 and 29 April 1964, at Beaumont, Texas wrongfully caused the transfer of cargo into an improperly vented compartment, in violation of Title 46 CFR 32.55-30(c); and

(5) On or about 18 May, 27 May, 11 June and 4 July 1965, at sea, wrongfully

caused the transfer of cargo over the deck through an open ended hose into an open hatch, in violation of 46 CFR 35.35-20(d).

At the hearing, Appellant was represented by non-professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of certain witnesses, and four photographs of piping installations aboard the vessel.

In defense, Appellant offered in evidence the testimony of four crew members of MISSION SAN RAFAEL and of an operator's representative to MSTS.

After the hearing, the Examiner rendered a written decision in which he concluded that the charge and all specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of three months.

The entire decision was served on 18 February 1966. Appeal was timely filed on 1 March 1966 and perfected on 25 July 1966.

FINDINGS OF FACTS

On all dates in question, Appellant was serving as chief mate on board the United States USNS MISSION RAFAEL and acting under authority of his license.

On or about 28 April 1964, Appellant caused a blind flange to be removed from a cargo stripping line and replaced by another which had a capped nipple attached.

The letter was, on or about 2 July 1965, removed and a gate valve was fitted on. The capped nipple was refitted to the outlet of the valve.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the changes to the fitting on the cargo piping were not "alterations" and that the evidence does not establish any improper transfer of cargo.

APPEARANCE: Phipps, Smith & Alexander of Galveston, Texas, by Irwin M. Herz, Jr. Esquire.

OPINION

Before proceeding to discuss any of the merits of this case, I must comment first upon the preparation of the charges.

Recently I had occasion to remark that a presentation of specification in chronological order, while not essential and sometimes not practicable is desirable whenever possible. Appeal No. 1577.

In this case, the specifications, insofar as time is concerned, are a jumble. The first deals with allegations of an offense committed before and after midnight of 28 April 1964.

The second deals with two alleged offenses, one committed before the matters in the first specification, the other approximately a year and two months later.

The third and fourth specifications take us back to the events of the first specification, while the fifth specifications alleges four different offenses in May, June, and July of 1965.

The second and fifth specifications allege between them six separate offenses committed during four different months in a period of over a year.

A practical result of such specification drawing will be pointed out later.

Another disturbing fact is that the "charge" as initially asserted in this case was amended at the outset of the hearing to "misconduct." The amendment, consented to by Appellant, raises no problem. "Violation of statue" or "violation of regulation" is properly pleaded and necessarily pleaded, when the allegation of fault is based "exclusively" on the provision of 46 U.S.C. 239 dealing with such violations. An allegation of fault is based "exclusively" on that provision when the party was not at the time of the alleged offense serving under authority of his license or document. When the party was so serving he is chargeable with "misconduct" whether or not the statute or regulation allegedly violated is part of or pursuant to Title 52, Revised Statutes. Thus, since Appellant was serving under authority of his license in this case, the amendment of the charge is immaterial.

Had the charge not been so amended, however, additional problems would have been present. If the first specification were intended to allege a violation of a regulation, I would be faced with the fact that the cited regulation contains only a definition of the word "cofferdam." As was mentioned in a recent case, no one can violate a regulation which merely prescribes a rule of evidence (46 CFR 157.30-10(c); see appeal Decision No. 1574)9 No more can one violate a definition.

With respect to the third and fifth specification, which originally alleged violation of 46 CFR 35.35-20(d), it must be noted that this cited paragraph does not prohibit the transfer of cargo into an open hatch. It requires only that the cognizant officer make an inspection to assure himself that certain conditions obtain. Since the initial charge did not allege that Appellant had failed to make such an inspection, it did not allege a violation of a regulation.

Fortuitously for the investigating officer, the terms of the regulation do set up criteria by which "misconduct" or "negligence" may be measured, and the affirmative evidence did tend to prove the impropriety of such transfer.

Niceties of pleading are not required in these administrative proceedings, (Appeal Decision No. 1574), but misreading of regulations and inattention to the facts alleged in pleading must be avoided.

II

On the merits, I wish to look first to the second specification which alleged two alterations of the piping system without prior approval of an Officer-in-Charge, Marine Inspection. Testimony of the chief pumpman was introduced as to the two alterations, and four photographs of pumping installations were admitted into evidence. The record is far from clear as to the purpose for the use of these photographs but one purpose seems to have been to show "before and after" conditions with respect to the "altered" fittings.

The entire record indicates that a strippline line had a gooseneck abreast the nine center tank. This had, prior to the offenses alleged in this case, a blind flange fitting. The chief pumpman testified that he, on orders of Appellant, replaced this blind flange with another, described by a marine inspector and seen in a photograph (Exhibit B) to be a flange with a nipple such as to reduce the opening to the size of a butterworth fitting, and a female cup. The second "alteration" was the removal of this substitute, and the replacement of the original blind flange by a gate valve to which was attached a capped reduction coupling identical to that just described.

The immediate question then is whether the replacement of what may be called the "original blind flange" by either or both of these other fittings was such an alteration as to have required the cognizance of an Officer-in-Charge, Marine Inspection.

It is obvious that in a stripping system such as described and pictured, a blind flange was intended to be removed; otherwise it would not have been there. If its removal was for some improper purpose, then the offense would not be "alteration" of the system but its improper use.

The fitting shown in Exhibit "b" is the equivalent of a blind flange. The fitting picture in Exhibit "C" and "C-1," is a valve with a fitting identical with that shown in Exhibit "B" capping it.

46 CFR 32.50-15(c) provides that "All cargo loading and discharge hose connections shall be fitted with valves or blind flanges."

The fittings here were clearly within the requirements of this material regulation. Thus there were no "alterations" of piping equipment not authorized by regulation.

III

The first specification, as has been noted, does not allege facts which constitute a violation of regulation. I am not at all certain that "altering the character" of a cofferdam, as defined in the regulations, is an offense, for a cofferdam is defined as a "void space." Intentionally filling that space

with water would not necessarily by misconduct not negligence, but it would render the space no longer a "void." However, I have no doubt that pumping flammable or combustible liquids into a cofferdam next to a fuel tank would be wrongful even in the absence of regulation.

The fourth specification deals with the same set of facts, the introduction of Grad B cargo into a compartment not vented for the carriage of such cargo.

For our purposes, the first and fourth specifications are the same. The third specification deals with the same set of facts but particularly looks at the method of transfer, allegedly through an open ended hose into an open hatch.

The question to be resolved, then is simply stated, "Did Appellant cause grade B cargo to be pumped into a cofferdam through an open ended hose through an open hatch?"

To resolve this, the quality and the quantity of the evidence must be considered.

IV

There was only one witness whose testimony could support an affirmative answer to the stated question. This was the chief pumpman. As he was also the only witness to the four offenses alleged in the fifth specification, his testimony must be viewed overall.

V

At the time the chief pumpman testified, the events of four of the specifications were fifteen months old. When Appellant called witnesses to testify, about 28 and 29 April 1964, the Investigating Officer objected that they couldn't recall happenings that old. But the chief pumpman's recollection was subject to the same test.

Although a wrongful alteration in the piping system was not established, the pumpman's testimony on the matter may be reviewed.

The specification alleged, and the examiner found, that these two alterations, fourteen months apart, were both made when the vessel was at sea. The finding was apparently based upon the pumpman's testimony (R-18) that both installations were made at sea.

However, the pumpman had testified that he personally had made the first installation "right in Beaumont at the docks," (R-17)9 He had also testified that he had joined the ship at Beaumont about 2300 of 28 April 1964. (R-13), so that he was not at sea on that day.

In view of this flat contradiction in his narrative, little credence can be given to the testimony of this witness.

The fifth specification, referring to four different occurrences on four different dates over a period of three months, was presumably, since no other evidence on the matter was caused, framed upon the basis of information given by the pumpman. But as to the very first date, 18 May 1965, he could not remember whether he had been aboard the vessel. The Investigating Officer prompted the pumpman's recollection by declaring, "anyway you had records yesterday to show that you were on board?" (R-19)

The quality of evidence given by a witness who has to be so openly coached on the record is not, I believe, adequate to support, uncorroborated, serious allegations of misconduct.

VI

Only one effort was made to support the edifice shaped by the chief pumpman.

An AB seaman was called by the Investigating Officer to testify that once he had seen a hose from a small line on the starboard side to a cofferdam, but that he didn't know what went through the hose.

No attempt was made to link this testimony to anything alleged in the fifth specification. (The witness was not on board the vessel in April 1964.)

The evidence was of no probative value whatever.

VII

There were witnesses introduced by Appellant who testified that they had never seen cargo pumped overall into an open hatch. The examiner commented that they did not testify that cargo had never been pumped overall. This seems to me to misconceive the nature of negative evidence.

Certainly the testimony of persons on board that they had never seen a hazardous practice which is alleged to have occurred with some frequency is entitle to some weight.

VIII

Appellant elicited some testimony from the chief pumpman which indicated that the witness was not entirely happy about Appellant. Another witness testified that the chief pumpman had stated his intentions to "get" the chief mate before he left ship.

Absolutely unexplained, although certainly a matter of some curiosity, is the chief pumpman's fifteen month silence as to what he knew, if he were to be believed, to be an extremely hazardous practice.

IX

It is my opinion that the uncorroborated testimony of a single witness who contradicted himself on a material fact is not reliable, probative, substantial evidence such as to establish proof of these serious charges.

A timely complaint of the transfer of petroleum cargo into a cofferdam (to a depth of ten feet of cargo, according to the testimony) could be scientifically and objectively verified. Such a complaint, fifteen months late, probably could not be so verified and no effort was made to do so.

ORDER

The order of the Examiner entered at Port Arthur, Texas, on 12 October 1965, is VACATED. The findings are SET ASIDE, and the charges are DISMISSED.

W.J. Smith
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 20th day of April 1967.

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